STATE OF MICHIGAN

COURT OF APPEALS

SLAVKO SAVESKI and LENCE SAVESKI,

Plaintiffs/Counter-Defendants-Appellees,

v

TISEO ARCHITECTS, INC., d/b/a TISEO BUILDERS, INC.,

Defendant/Counter-Plaintiff-Appellant,

and

BENEDETTO TISEO,

Defendant-Appellant.

UNPUBLISHED
March 29, 2007

No. 261269
Livingston Circuit Court
LC No. 99-017479-CH

AFTER REMAND

Before: Sawyer, P.J., and Wilder and Servitto, JJ.

PER CURIAM.

Defendants Tiseo Architects, Inc. d/b/a Tiseo Builders, Inc. (Tiseo Builders) and Benedetto Tiseo appeal as of right an order denying defendants' motion for sanctions, specifically attorney fees and costs. Defendants also move to vacate the trial court's order denying their motion for sanctions. This case is before this Court for a second time following an order of remand in *Saveski v Tiseo Architects, Inc,* unpublished opinion per curiam of the Court of Appeals, issued October 19, 2006 (Docket No. 261269). Because the trial court did not clearly err in denying defendants' motion for sanctions, we deny defendants' motion to vacate and affirm the trial court's order.

Plaintiffs brought a seven-count complaint against defendants for, among other things, breach of contract, after the relationship between plaintiffs and defendants (who had been hired to perform construction management services) broke down. Defendants successfully moved for the matter to be arbitrated pursuant to an arbitration clause contained in the contract. Plaintiffs and their attorney thereafter attempted to set aside the arbitration award by arguing that plaintiff Slavko Saveski could not be bound by the award because he had not signed the contract. A bench trial was then held based on this issue. During that trial, Slavko Saveski stated that he had in fact signed the contract or let his wife, plaintiff Lence Saveski, sign for him. The trial court

immediately terminated the trial. Defendants moved for sanctions shortly thereafter and the trial court denied the motion without explanation. We thus remanded to the circuit court to make proper findings of fact and conclusions of law as to whether plaintiffs and their attorney at the time violated MCR 2.114 or MCL 600.2591. We retained jurisdiction.

We review a trial court's determination whether to impose sanctions for clear error. *Kitchen v Kitchen*, 465 Mich 654, 661-662; 641 NW2d 245 (2002). A decision is clearly erroneous where, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id.*

Under MCR 2.114(D), all documents submitted by a party must be signed by that party or the party's attorney, which effectively certifies that:

> (1) he or she has read the document;
>
> (2) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and
>
> (3) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

If a violation of MCR 2.114(D) is found, the trial court is required to impose sanctions under MCR 2.114(E). *Contel Sys Corp v Gores*, 183 Mich App 706, 710-711; 455 NW2d 398 (1990). Upon a finding that a violation of MCR 2.114(D) has occurred, sanctions shall be imposed on the attorney, client, or both and may include "the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees." MCR 2.114(E).

MCR 2.625(A)(2) states that "if the court finds on motion of a party that an action or defense was frivolous, costs shall be awarded as provided by MCL 600.2591." Under MCL 600.2591(3)(a), a civil action is "frivolous" if at least one of the following circumstances is shown:

> (i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
>
> (ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
>
> (iii) The party's legal position was devoid of arguable legal merit.

The above statutory "definition of 'frivolous' parallels the provisions of MCR 2.114(D)." *FMB-First Michigan Bank v Bailey*, 232 Mich App 711, 720-721; 591 NW2d 676 (1998). If a party asserts a frivolous claim or defense under MCL 600.2591, the imposition of sanctions is required. MCR 2.625(A)(2); MCL 600.2591; *FMB-First Michigan Bank, supra* at 720-721. MCL 600.2591(2) provides that "costs and fees awarded under this section shall include all

reasonable costs actually incurred by the prevailing party and any costs allowed by law or by court rule, including court costs and reasonable attorney fees."

Whether a claim is frivolous must be determined based on the circumstances that existed at the time the claim was asserted. *Jerico Constr, Inc v Quadrants, Inc*, 257 Mich App 22, 36; 666 NW2d 310 (2003). Under statute and court rule, again, an attorney and the represented party have an affirmative duty to conduct a reasonable inquiry into the factual and legal viability of the alleged claim before signing any document. See *Attorney General v Harkins*, 257 Mich App 564, 576; 669 NW2d 296 (2003). Whether the inquiry was reasonable is determined by an objective standard. *Id.* Reasonableness is determined by the efforts taken in investigating a claim before filing suit, and the determination of reasonable inquiry depends on the facts of the case. *Id.*

On appeal, and in their motion to vacate, defendants argue that the document signed by trial counsel triggering the bench trial could not have been well grounded in fact, given plaintiff Slavko's later admission at trial concerning his signature on (or consent to) the contract. Plaintiffs, naturally, respond that no violation of MCR 2.114 occurred and that the action was not frivolous such that the trial court appropriately denied defendants' motion for sanctions. We agree with plaintiffs.

The trial court[1] held an evidentiary hearing to address this Court's order of remand. At the evidentiary hearing, the judge indicated that he reviewed videotapes of the trial as well as transcripts of the necessary proceedings. The judge also played a videotape of conversations that took place between plaintiff Slavko and his trial counsel in the courtroom, when the trial had been halted and the trial judge was not on the bench, but while the video and sound recording equipment continued to record. On the videotape, plaintiffs' counsel indicated that the trial was over because while plaintiff Slavko had said he did not know about the contract until counsel told him about in 2001, he just testified that he knew about and signed it. Plaintiff Slavko asserted to counsel that he did not sign the contract and did not understand what he was being asked.

In rendering its decision, the court pointed out that when plaintiff Slavko testified at trial that he had signed the contract/allowed his wife to sign the contract on his behalf, plaintiffs' counsel immediately asked if he knew what he was talking about. The trial court also noted that plaintiffs' counsel appeared very surprised that plaintiff Slavko was giving that testimony. The trial court also recognized that in the videotaped, off-the-record discussion between plaintiff Slavko and counsel, plaintiff Slavko vehemently denied signing the contract. The court thus found that counsel's arguments were in good faith and based upon existing law and that no sanctions were appropriate as to plaintiffs' counsel.

As to whether plaintiffs should be sanctioned, the court first noted that immediately after the trial was halted, plaintiff Slavko recanted his testimony off the record, and was not given an

[1] The judge holding the evidentiary hearing was not the same judge who had presided over the trial, the latter judge having retired.

opportunity to explain himself or recant his testimony on the record. The court also noted that during the trial, plaintiff Slavko recanted other sworn testimony and that no contract signed by plaintiff Slavko was ever produced. The trial court stated that plaintiff Slavko spoke in broken English and that the translators could not agree as to what Plaintiff Slavko said at certain times, thus indicating a difficulty with communication. The court concluded, based on the above, that the action was not frivolous or meant to harass and that an award of sanctions would not be appropriate.

We find the trial court's reasoning sound. There is no indication that at any point in time plaintiffs' counsel knew or believed that plaintiff Slavko had signed the contract. There is also some concern as to whether plaintiff Slavko understood what he was testifying to, given that no one claimed to have or have seen a contract signed by plaintiff Slavko. We thus find no error in the denial of defendants' motion for sanctions and no basis to vacate the trial court's order.

Affirmed.

/s/ David H. Sawyer
/s/ Kurtis T. Wilder
/s/ Deborah A. Servitto